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# PARENTS, JUDGES, AND A MINOR'S ABORTION DECISION: THIRD PARTY PARTICIPATION AND THE EVOLUTION OF A JUDICIAL ALTERNATIVE

by

WILLIAM GREEN\*†

## I. INTRODUCTION

OVER ONE AND A HALF MILLION women obtain legal abortions every year.<sup>1</sup> Approximately one-third are women under the age of eighteen.<sup>2</sup> The seminal United States Supreme Court case of *Roe v. Wade*<sup>3</sup> did not discuss what rights parents might have to participate in their minor child's decision to have an abortion. After *Roe*, legislatures in several states adopted statutes requiring parental consent for the performance of a minor's abortion. Some states provided minors who did not want to seek parental consent with the alternative of judicial consent. Other states required a physician to notify a minor's parents before he performed the abortion. The Supreme Court has examined these statutes on three occasions without clearly resolving the issue of parental consent. This past term when the Court once again confronted the issue in *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>4</sup> and *Planned Parenthood v. Ashcroft*,<sup>5</sup> it was able to provide support for adult third party participation.

This article will examine the Supreme Court's modification of *Roe v. Wade* to permit third party participation in a minor's abortion decision-making: how it originated, what direction it has taken and at whose initiative, and what issues remain. This article will argue that the Court's difficulty in resolving this issue resulted from the justices' disagreement over what recognition, if any, should be given to the minor-related interests that states have asserted to support third party involvement. This article will also argue that the Court's eventual ability to reach agreement was due primarily to the policy leadership of Justice Powell. Part I will set out a framework for the analysis of third party participation.

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<sup>1</sup>In 1980, there were 1,533,000 legal abortions in the United States. Bureau of the Census, U.S. Dep't. of Commerce. STATISTICAL ABSTRACT OF THE UNITED STATES, 1982-83, 68 (1982).

<sup>2</sup>In 1980, 461,000 women under nineteen received legal abortions in the United States. *Id.*

<sup>3</sup>410 U.S. 113 (1973).

<sup>4</sup>103 S.Ct. 2481 (1983).

<sup>5</sup>103 S.Ct. 2517 (1983).

This framework is based on five third party models and three judicial rationales for the analysis of statutes based on those models. This framework will then be used to evaluate the Court's initial response in *Planned Parenthood v. Danforth*,<sup>6</sup> *Bellotti v. Baird (Bellotti II)*,<sup>7</sup> and *H. L. v. Matheson*.<sup>8</sup> Part II will then employ the framework to examine the *Akron Center* and *Ashcroft* cases. It will describe the third party provisions in an Akron ordinance and a Missouri statute and then analyze the judicial response to those laws. Part III will draw some conclusions regarding the Court's decisions and then discuss what third party issues remain to be decided.

### I. THIRD PARTY PARTICIPATION IN A MINOR'S ABORTION DECISION

The Supreme Court's examination of state legislation authorizing third party participation has been framed by its decision in *Roe v. Wade*. In that case the Court established a bilateral participation model that involved the woman and her physician.<sup>9</sup> State involvement was severely restricted, because *Roe* required that any regulation of a woman's abortion decision had to be justified by a compelling state interest in either maternal health or fetal life.<sup>10</sup> A major issue since *Roe* has been whether its bilateral model should be altered to permit other adult participants to become involved in a minor woman's abortion decision.

#### A. Trilateral Participation Models

A central issue in the controversy over third party participation has been the competence of a minor woman to make an informed decision. State abortion legislation enacted after *Roe* generally assumed that a minor was not competent to make an informed decision in consultation with her physician. These statutes have prohibited a physician from performing an abortion on a minor unless an adult third party — a parent or a judge — has been involved in the minor's decision-making. These third party participation provisions, justified by an asserted state interest in protecting children, parental authority, and the family relationship, have required two types of trilateral participation — consent and notice — illustrated in Figure 1 and described below.

Parental consent statutes commonly impose on the minor woman the duty to obtain parental or judicial consent, which the physician must have before he performs the abortion. These statutes are based on three model provisions which differ basically in the extent of participation by the two principal third parties i.e., parents and judges. Model I consent provisions (A-B-D) recognize a strong parental role with their requirement of exclusive parental involvement in the minor's abortion decision. These provisions contemplate that a minor

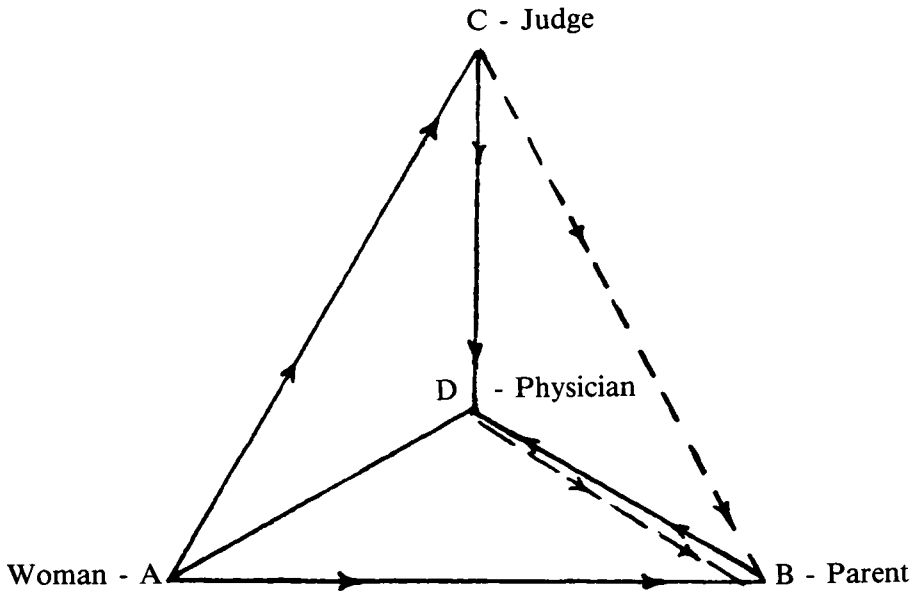
<sup>6</sup>428 U.S. 52 (1976).

<sup>7</sup>443 U.S. 622 (1979).

<sup>8</sup>450 U.S. 398 (1981).

<sup>9</sup>410 U.S. at 153.

<sup>10</sup>*Id.* at 162-64.

**FIGURE 1****ABORTION PARTICIPATION MODELS***Note:*

Solid lines with arrows indicate third party consent routes.

Broken lines with arrows indicate third party notice routes.

A-D is the *Roe* bilateral model.

will have notified and consulted with her parents, because they commonly require the minor to obtain written parental consent before the abortion is performed.<sup>11</sup> Model II and III consent provisions grant the minor a judicial alternative to exclusive parental participation in the abortion decision. Model II consent provisions (A-B-D then A-C-D) require the minor to initially request her parents' consent and then, if they refuse, to petition a court for an order that would permit her to have an abortion.<sup>12</sup> Model III consent provisions (A-B-D or A-C-D) substitute the "parents first" requirement of Model II with a "judges first" option. If the minor does not want to ask for her parents' consent she may petition a state court to order the physician to perform the abortion.<sup>13</sup> Thus, Model II and III provisions increasingly weaken the exclusive parental role, but they do not necessarily eliminate parental involvement.

<sup>11</sup>Act of June 14, 1974, § 3(4), 1974 Mo. Laws 809.

<sup>12</sup>See, e.g., MASS. GEN. LAWS ANN. ch. 112 § 12S (West 1983).

<sup>13</sup>See, e.g., AKRON, OHIO, CODIFIED ORDINANCES ch. 1870.05(B) (1975); MO. ANN. STAT. § 188.028 (Vernon Supp. 1978).

Parental notice statutes commonly require notification of and consultation with the minor's parents. These statutes are based on two model provisions. Judicial notice provisions (C-B) impose on a court the duty to notify the parents prior to the abortion hearing and may provide them with the opportunity for consultation and participation prior to the judge's decision on their minor daughter's petition.<sup>14</sup> Physician notice provisions (D-B) impose on the doctor a similar notice duty before he performs an abortion on a minor child.<sup>15</sup>

State abortion statutes contain both parental consent and notice provisions. Model II and III provisions which contain a judicial consent alternative may be joined with a judicial and/or physician notice provision. When they are joined, the purpose is to assure that if the minor chooses the judicial alternative her parents will have the opportunity to become involved before a court issues its order and the physician performs the abortion. The extent to which parents may become involved depends upon two characteristics of notice provisions: their scope and depth. First, some provisions limit notification to the parents of immature and dependent minors, while others require that all parents be notified.<sup>16</sup> Second, some provisions require parental notification, if possible, while others contain a formal notice requirement.<sup>17</sup> Judicial notice statutes have even gone so far as to permit parents to consult with the child and the judge, grant parents the right to participate in the hearing and appeal, and provide indigent parents with court-appointed counsel.<sup>18</sup> These notice provisions raise several questions: Are any of them acceptable and, if so, under what circumstances, or do they intrude upon the confidentiality of the judicial alternative or of the participants in the *Roe* bilateral model?

### B. Judicial Response

How has the Supreme Court responded to parental consent and notice statutes based on these trilateral participation models? The Court has used a middle level scrutiny test: Does the state have important or significant minor-related interests and, if it does, do its regulations of a minor's abortion serve those governmental interests?<sup>19</sup> Using this test to explain the decisions in parental consent and notice cases is difficult, because the justices have employed it to justify very different views about third party participation.<sup>20</sup> What can explain the Court's difficulty with the issue of a minor's abortion decision-making and

<sup>14</sup>See, e.g., MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); MO. ANN. STAT. § 188.028.2(2),(3),(6) (Vernon Supp. 1978).

<sup>15</sup>See, e.g., AKRON, OHIO, CODIFIED ORDINANCES ch. 1870.05(A) (1975).

<sup>16</sup>Compare UTAH CODE ANN. § 76-7-304(2) (1953) with MO. ANN. STAT. § 188.028.2(2) (Vernon Supp. 1978) and AKRON, OHIO, CODIFIED ORDINANCES ch. 1870.05(A) (1975).

<sup>17</sup>*Id.*

<sup>18</sup>MO. ANN. STAT. § 188.028.2(3),(6) (Vernon Supp. 1978).

<sup>19</sup>428 U.S. at 74-75 (1976).

<sup>20</sup>The justices agree that state regulation of a minor's abortion will be evaluated by whether such regulation advances significant state interests. There is no consensus, however, on whether such interests can serve as the basis for regulation of a minor's abortion decision-making. See *infra* notes 21-23 and accompanying text.

how it has agreed to modify the *Roe* bilateral model? This article will argue that the Court's decisional behavior can be explained as the interaction of three different rationales on which the justices have relied to answer the question of what recognition, if any, should be given to the interests states have advanced to justify third party participation in a minor's abortion decision-making.

The Pro-Woman Rationale opposes any modification of the *Roe* bilateral model. It acknowledges that states have significant minor-related interests, but maintains that state regulation of a minor's abortion based on any of the trilateral models cannot serve those state interests. Those models, according to this rationale, are based on an idealistic view of parent-child relations which permits third-party self-interested action to impermissibly burden the woman's *Roe*-granted privacy right.<sup>21</sup>

The Pro-State Rationale accepts modifications of the *Roe* bilateral model reasonably necessary to further significant minor-related interests. It is willing to indulge the traditional assumptions about children and parents on which a state legislative action is based; i.e., that minors are presumptively incapable of informed consent and that parents will act in their child's best interests most of the time. As a result, this rationale claims that regulations requiring third party involvement will assist the minor in exercising her *Roe*-granted right.<sup>22</sup>

The Accommodation Rationale accepts modification of the *Roe* bilateral model. It agrees that states have significant minor-related interests, but it will not permit those interests to be implemented in a blanket fashion. Instead, this rationale requires the examination of the assumptions on which a legislature's judgment has been made and then requires that if a state wishes to regulate a minor's abortion decision-making then it must establish standards for third party participation which protect a minor's privacy right while respecting the state's minor-related interests.<sup>23</sup>

How has the use of these three rationales explained judicial behavior in third party participation cases? The Court's initial response in *Danforth*, *Bellotti II*, and *Matheson* will be examined below.

### 1. Planned Parenthood v. Danforth

State abortion laws containing third party consent requirements for minors

<sup>21</sup>See *Planned Parenthood v. Ashcroft*, 103 S. Ct. 2517, 2526-32 (1983) (Blackmun, J., dissenting); *H.L. v. Matheson*, 450 U.S. 398, 425-54 (1981) (Marshall, J., dissenting); *Bellotti v. Baird*, 443 U.S. 622, 652-56 (1979) (Stevens, J., concurring); *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-79 (1976) (Blackmun, J., plurality opinion).

<sup>22</sup>See *Matheson*, 450 U.S. at 420-25 (Stevens, J., concurring); *Bellotti*, 443 U.S. at 656-57 (White, J., dissenting); *Danforth*, 428 U.S. at 94-95 (White, J., dissenting) and 101-05 (Stevens, J., dissenting).

<sup>23</sup>See *Ashcroft*, 103 S. Ct. at 2525-26 (Powell, J., plurality opinion); *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2497-99 (1983); *Matheson*, 450 U.S. at 399-413 (Burger, C.J., plurality opinion) and 413-25 (Powell, J., concurring); *Bellotti*, 443 U.S. at 624-51 (Powell, J., plurality opinion); *Danforth*, 428 U.S. at 90-92 (Stewart, J., concurring).

were first examined by the Supreme Court in *Planned Parenthood v. Danforth*.<sup>24</sup> The Missouri statute, typical of Model I consent provisions enacted immediately after *Roe*, provided that where the pregnant woman was unmarried and under eighteen the written consent of a parent was required.<sup>25</sup> The Court found that the exclusive parental consent provision was unconstitutional, but its decision revealed that the Court was closely divided over the applicability of the *Roe* bilateral model to a minor's abortion decision-making.

Justice Blackmun announced the judgment of the Court in an opinion joined by Justices Brennan and Marshall. Justice Blackmun, relying upon the Pro-Woman Rationale, found that the parental consent provision was unacceptable because it provided a third party with "an absolute and possibly arbitrary veto," which overrode the minor's privacy right without furthering the state interests in safeguarding the family and enhancing parental authority and control.<sup>26</sup> It was unlikely, he asserted, "that such veto power will enhance parental authority or control where the minor and the non-consenting parent are so fundamentally in conflict and where the very existence of the pregnancy already has fractured the family structure."<sup>27</sup> Justice Stewart, in a concurrence joined by Justice Powell, believed that the state could encourage a minor to seek parental assistance, but agreed with Justice Blackmun that Missouri's parental consent statute was invalid because it imposed "an absolute limitation on the minor's right to obtain an abortion."<sup>28</sup>

Justices White and Stevens, writing separately in dissent, analyzed the Missouri parental consent requirement using a Pro-State Rationale. Justice Steven's dissent argued that the state had an interest in the welfare of children and the power to protect a minor against an incorrect abortion decision, because the most significant consequences of an abortion were non-medical.<sup>29</sup> It was reasonable, he said, for a state legislature to assume that parents would be interested in their child's welfare and to conclude that a parental consent requirement was an appropriate means to foster the child's welfare and to assist the child in making a correct decision.<sup>30</sup> Justice White, joined in a brief dissent by Chief Justice Burger and Justice Rehnquist, agreed that Missouri's parental consent provision was "the traditional way by which States have sought to protect children from their own immature and improvident decisions."<sup>31</sup>

In sum, *Danforth* forbade consent provisions which required written parental consent for an unmarried minor to obtain an abortion. However, it left

<sup>24</sup>428 U.S. 52 (1976).

<sup>25</sup>Act of June 14, 1974, § 3(4), 1974 Mo. Laws 809.

<sup>26</sup>428 U.S. at 75.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 90.

<sup>29</sup>*Id.* at 103.

<sup>30</sup>*Id.* at 104.

<sup>31</sup>*Id.* at 95.

undecided whether any third party participation was permissible. *Danforth* was a potentially far-reaching decision. In overturning the Missouri parental consent provision, Justice Blackmun declared that a state did not have the power to give any third party an absolute veto.<sup>32</sup> At the same time, *Danforth* also suggested that future conflict might well focus on an Accommodation Rationale. If some form of third party participation in a minor's abortion decision were permissible, two questions would remain. First, could a state distinguish between minors on the basis of their maturity and independence in determining whether they could give effective consent? Justice Blackmun emphasized that the holding in *Danforth* did "not suggest that every minor, regardless of age or maturity, may give effective consent to the termination of her pregnancy."<sup>33</sup> Second, could a state require all minors, irrespective of their maturity, to obtain approval for their abortions from an adult participant? In his concurrence, Justice Stewart, joined by Justice Powell, suggested for the first time that a third party consent provision would be constitutionally acceptable if it included "a provision requiring parental consent or consultation in most cases, but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that an abortion in any event is in the minor's best interest."<sup>34</sup> These unanswered questions confronted the Court once again when it examined a Model II consent statute.

## 2. *Bellotti v. Baird*

A Massachusetts abortion statute<sup>35</sup> contained a Model II consent provision and a blanket judicial notice requirement, both of which were the subject of extended litigation. The statute was first considered in *Bellotti v. Baird* (*Bellotti I*)<sup>36</sup> where the Supreme Court vacated the district court decision because the state supreme court had not been given the opportunity to authoritatively construe the statute in order to "avoid in whole or part the necessity for federal constitutional adjudication . . . ."<sup>37</sup> After the statute was construed on remand, the district court once again declared it unconstitutional. On direct appeal in *Bellotti v. Baird* (*Bellotti II*), the Supreme Court affirmed 8-1, but was unable to agree on the statute's constitutional defect.<sup>38</sup> Once again the Court was divided over the applicability of the *Roe* bilateral model to a woman's abortion decision-making.

Justice Powell announced the judgment of the Court in an opinion joined

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<sup>32</sup>*Id.* at 74.

<sup>33</sup>*Id.* at 75.

<sup>34</sup>*Id.* at 90-91.

<sup>35</sup>MASS. GEN. LAWS ANN. ch. 112 § 12S (West 1983).

<sup>36</sup>428 U.S. 132 (1976).

<sup>37</sup>*Id.* at 147 (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

<sup>38</sup>443 U.S. 622 (1979).



by Chief Justice Burger and Justices Stewart and Rehnquist. To analyze the Massachusetts statute, Justice Powell proposed a third party provision based on the Accommodation Rationale. His proposal contained a Model III provision. It would permit a state to require a minor to seek adult consent, but would require the state to provide her with a choice which included a "courts first" option. "[E]very minor must have the opportunity — if she so desires — to go directly to a court without first consulting or notifying her parents."<sup>39</sup>

If the minor sought court approval, three standards would limit judicial discretion: individuality, confidentiality, and expeditiousness. First, a judge's discretion would be limited by the individual minor's status. Justice Powell stated that the statute must provide the minor with the opportunity to show either (1) that she is mature enough and well enough informed to make her abortion decision in consultation with her physician independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.<sup>40</sup> If the minor satisfied the court of her maturity, the court had to authorize her abortion.<sup>41</sup> If, however, she failed to satisfy the court of her maturity, then the court's discretion was limited to a determination of whether an abortion would be in her best interests.<sup>42</sup> Second, the statute had to limit judicial discretion and parental involvement by tailoring the confidentiality of the judicial proceeding to the individual minor's status. Here, Justice Powell proposed a limited judicial notice provision. If a court decided a minor was mature then it had no discretion, but had to authorize her to act without parental involvement.<sup>43</sup> In making a decision about an immature minor's best interests, a court would, however, have the discretion to authorize her abortion without parental involvement, "deny the abortion . . . in the absence of parental consultation or . . . defer the decision until there is parental consultation in which the court may participate."<sup>44</sup> Third, the statute had to assure that "a resolution of the issue and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for the abortion to be obtained."<sup>45</sup>

Applying his third party proposal, Justice Powell condemned the statute because it did not provide the minor with an option, but instead required parental denial first and then permitted the minor to petition a court.<sup>46</sup> The statute's judicial alternative also contained two defects. First, it gave a court unconfin-

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<sup>39</sup>*Id.* at 647.

<sup>40</sup>*Id.* at 643-44.

<sup>41</sup>*Id.* at 647.

<sup>42</sup>*Id.* at 647-48.

<sup>43</sup>*Id.* at 647.

<sup>44</sup>*Id.* at 648.

<sup>45</sup>*Id.* at 644.

<sup>46</sup>*Id.* at 647.

ed discretion to determine the best interests of the minor irrespective of her maturity.<sup>47</sup> Second, it intruded indiscriminately upon the confidentiality of minors, because it contained a judicial notice provision which required a court to notify and consult with all parents.<sup>48</sup> Justice Powell did, however, conclude that the statute could be construed to assure a prompt judicial decision.<sup>49</sup>

Justice Stevens, in an opinion joined by Justices Brennan, Marshall, and Blackmun, concurred on narrow grounds. Justice Stevens rejected Justice Powell's third party proposal as an advisory opinion.<sup>50</sup> The *Danforth* bilateral model governed a minor's abortion decision-making; i.e., a state could not "give a third party an absolute, and possibly arbitrary veto over the decision of the physician and his patient . . . ."<sup>51</sup> Applying *Danforth*, Justice Stevens found the Massachusetts statute unconstitutional because it imposed a double veto: first parental and then judicial.<sup>52</sup> The judicial alternative was objectionable for two reasons. First, the resort to the judicial process "would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent."<sup>53</sup> Second, the statute afforded the judge a veto, because his decision would be based on a best interests standard. "That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor — particularly when contrary to her own informed and reasonable decision — is fundamentally at odds with [her] privacy interests . . . ."<sup>54</sup> Justice Stevens was, however, unwilling to say whether a third party provision which met his criticisms of the Massachusetts statute would be acceptable. Unlike Justice Powell, he refused to address "the constitutionality of an abortion statute that Massachusetts had not enacted . . . ."<sup>55</sup>

In sum, any Model II consent provision or a blanket judicial notice provision was unconstitutional on the basis of either the Accommodation or the Pro-Woman Rationale as set forth in *Bellotti II*'s plurality opinions. However, *Bellotti II*'s failure to provide an authoritative statement of judicial participation left in doubt the Court's view of Model III and judicial notice provisions enacted prior to the Court's decision. Justice Stevens along with Justices Brennan, Marshall, and Blackmun were completely unsympathetic to adult third party participation provisions. The Powell plurality (Justices Powell, Stewart, Burger, and Rehnquist) just as strongly supported an adult participant, but granted the minor the discretion to choose and required that the

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<sup>47</sup>*Id.* at 651.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 644-45.

<sup>50</sup>*Id.* at 656 n.4.

<sup>51</sup>*Id.* at 654.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 655.

<sup>54</sup>*Id.* at 655-56.

<sup>55</sup>*Id.* at 656.

judicial alternative be structured so as to maximize the values of individuality, confidentiality, and expedition. Justice White's disagreement with both of these plurality views confused the matter even further. In his dissent, he relied on a Pro-State Rationale to approve the Massachusetts Model II consent provision and its blanket judicial notice provision. He believed that a state could require that all parents receive notice and have the opportunity to participate in a judicial hearing to determine the minor's best interests.<sup>56</sup> The effect of these divergent rationales on the Court's response to Model III consent provisions and judicial notice requirements would, however, have to await the outcome of the Court's examination of physician notice provisions.

### 3. *H.L. v. Matheson*

State abortion statutes containing requirements that a physician notify the minor's parents were first examined by the Court in *H.L. v. Matheson*.<sup>57</sup> At issue was a Utah statute which required a physician to "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor."<sup>58</sup> The Court decided 6-3 that the parental notice provision as applied to an immature, dependent minor was constitutional, but once again it remained divided over the involvement of third parties in a minor's abortion decision.

Chief Justice Burger announced the judgment of the Court in an opinion joined only by Justices White and Rehnquist. The Chief Justice avoided the broad question decided by the Utah Supreme Court — whether the physician notice provision applied to all minors — by denying that the minor appellant possessed standing to challenge the applicability of the statute to mature and emancipated minors.<sup>59</sup> As a consequence, he addressed only the narrow issue presented by the appellant's factual situation: Whether the statute required the physician to give prior notice to the parents of an immature, dependent minor.<sup>60</sup> The Chief Justice answered in terms of the Accommodation Rationale: *Danforth* held that a blanket parental consent provision (Model I) provided parents with unreviewable veto power, but the mere requirement of parental notice limited to immature and dependent minors did not impose the same undue burden.<sup>61</sup> As applied to these minors, the Chief Justice concluded, such a provision served important state interests in protecting children, promoting family integrity, and improving a physician's judgment.<sup>62</sup>

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<sup>56</sup>*Id.* at 656-67.

<sup>57</sup>450 U.S. 398 (1981).

<sup>58</sup>UTAH CODE ANN. § 76-7-304(2) (1953).

<sup>59</sup>450 U.S. at 405-06 (1981).

<sup>60</sup>*Id.* at 407.

<sup>61</sup>*Id.* at 409.

<sup>62</sup>*Id.* at 411-12.

Justices Powell and Stevens concurred in the judgment that the Utah statute did not burden the minor woman's abortion right, but disagreed with one another over the breadth of the notice requirement. Justice Powell, joined by Justice Stewart, argued that a blanket physician notice requirement was at odds with his *Bellotti II* opinion unless it provided the mature or "best interests" minor with an independent decision-maker.<sup>63</sup> He wrote separately to make it clear that he subscribed to Chief Justice Burger's application of the Accommodation Rationale as long as notice was limited to immature and dependent minors and that the Court's decision left open "the question [as to] whether . . . [the statute] burdens the right of a mature minor or a minor whose best interests would not be served by parental notification."<sup>64</sup>

Justice Stevens, concurring alone, disagreed. He believed that the state's interests were sufficient to support a notification requirement for all minors. Using a Pro-State Rationale, Justice Stevens argued, as he had in *Danforth*, that the state had the power to assure that a minor made a correct decision and a parental notification requirement was an appropriate means to assure that outcome.<sup>65</sup> The rationale of this legislative choice, Justice Stevens further argued, was not undercut by the fact that some minors may not be mature or emancipated or by "[t]he possibility that some parents will not react with compassion and understanding . . . [or] will incorrectly advise [their child] . . . ."<sup>66</sup>

Justice Marshall, joined by Justices Brennan and Blackmun in dissent, argued that the physician notice requirement was inconsistent with the Pro-Woman Rationale, because it infringed on the minor's privacy right while failing to serve any of the asserted significant state interests. The notice provisions also intruded upon the confidentiality of the doctor-patient relationship<sup>67</sup> and placed an undue burden on a women's decision functionally equivalent to that imposed by consent requirements.<sup>68</sup> Moreover, the provisions were inconsistent with *Bellotti II*'s rejection of a state statute which had authorized "judicial review of a minor's abortion decision . . . precisely because a parent notified of the court action might interfere."<sup>69</sup>

In sum, *Matheson* held that a physician notice provision was constitutional if it were limited to immature and dependent minors. This decision is notable for two reasons. It was the first time that the Court upheld a state regulation of a minor's abortion decision that altered the *Roe* bilateral model. It was also the first time that the Court was able to reach rough agreement on a common

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<sup>63</sup>*Id.* at 420.

<sup>64</sup>*Id.* at 414.

<sup>65</sup>*Id.* at 423.

<sup>66</sup>*Id.* at 424.

<sup>67</sup>*Id.* at 437-38.

<sup>68</sup>*Id.* at 438.

<sup>69</sup>*Id.* at 440 n.27.

rationale: the Accommodation Rationale. Rough agreement occurred because only four justices can be said to have firmly supported the Accommodation Rationale — Justices Burger, Rehnquist, Powell, and Stewart. They composed the Powell plurality that had used the Accommodation Rationale in *Bellotti II*. Justice White's participation in Chief Justice Burger's *Matheson* opinion is suspicious. His dissents in *Roe*, *Danforth*, and *Bellotti II* are more consistent with the Pro-State Rationale that Justice Stevens relied upon in his *Matheson* concurrence. Justice Stevens' change from opposition to third party consent in *Bellotti II* to support for a blanket notice requirement in *Matheson* is not necessarily inconsistent if one is willing to accept his explanation that notice and consent requirements are fundamentally different. This rough agreement on a common rationale was, however, firmly opposed by Justices Blackmun, Brennan, and Marshall who espoused a Pro-Woman Rationale. As a consequence of this continuing disagreement, *Matheson* suggested that future conflicts would focus on two problems. First, would it be permissible to require a physician to notify all parents? Second, what impact would a physician notice requirement have on the confidentiality of a judicial consent alternative? In this uncertain legal context, two pre-*Bellotti II* enactments — an Akron, Ohio ordinance and a Missouri statute — began their journey through the federal courts.<sup>70</sup>

## II. AKRON CENTER AND ASHCROFT CASES

### A. *The Ordinance and the Statute*

The ordinance passed by the Akron City Council and the statute enacted by the Missouri General Assembly regulating a minor's abortion decision-making shared one common feature: they contained Model III consent provisions.<sup>71</sup> These laws granted the minor a choice of adult third party participants. If she did not want to ask her parents' consent, then she could petition a state juvenile court for an order authorizing a physician to abort her. However, their judicial alternatives differed in one important respect. The city ordinance stated in general terms the minor's right to a court-ordered abortion, while the state statute spelled out the judicial alternative in elaborate detail. In addition, these laws each contained a notice provision. The Missouri statute included a judicial notice provision which required formal notice to all parents and the opportunity for parents to participate in the abortion hearing and appeal.<sup>72</sup> The Akron Ordinance contained a similarly broad and detailed physician notice provision, but required its use only if the woman invoked the ordinance's judicial alternative and received a court order for an abortion.<sup>73</sup>

<sup>70</sup>The Akron ordinance was enacted on February 28, 1978 and the Missouri statute on June 29, 1979, three days before the Supreme Court's decision in *Bellotti II*.

<sup>71</sup>AKRON, OHIO, CODIFIED ORDINANCES, ch. 1870.05(B) (1975) and MO. ANN. STAT. § 188.028.2 (Vernon Supp. 1978).

<sup>72</sup>MO. ANN. STAT. § 188.028.2 (Vernon Supp. 1978).

<sup>73</sup>Section 1870.05(A) of the Akron ordinance is redundant, if, as under the Ohio juvenile statute (*supra* note 72), parental involvement is required in a court proceeding for an abortion.

## 1. Akron Ordinance

Section 1870.05 of the Codified Ordinances of the City of Akron, Ohio, contains the parental notice and consent provisions.<sup>74</sup> Subsection (A) imposes a physician notice provision. It requires a physician to give formal notice to the parents of a minor under eighteen years of age prior to her abortion if she invokes the ordinance's judicial alternative in section 1870.05(B)(2).<sup>75</sup> Subsection (B)(1) imposes a written parental consent requirement on a minor under fifteen. It requires a physician to first obtain the "informed written consent of [the minor's] parents or legal guardian."<sup>76</sup> However, subsection (B)(2) permits a physician to perform an abortion on a woman under fifteen without parental consent if "[t]he minor pregnant woman first . . . [has] obtained an order from a court having jurisdiction over her that the abortion be performed or induced."<sup>77</sup> The judicial alternative to which the ordinance refers is a proceeding in a state juvenile court. The state juvenile statute gives no particular attention to the minor's pregnant status, but treats her petition as a case of parental negligence and mandates that her parents be notified and given the right to participate in a hearing where the judge will have the discretion to determine the minor's best interests.<sup>78</sup>

## 2. Missouri Statute

Section 188.028 of the Missouri Statutes contains the parental notice and consent provisions.<sup>79</sup> Section 188.028.1 imposes a parental consent requirement on a woman under eighteen unless she is emancipated or has invoked the statute's judicial alternative and received a court order permitting her to have an abortion.<sup>80</sup>

Section 188.028.2 provides an extremely detailed alternative judicial procedure. It permits a minor to request two orders from a court: a self-consent order because the court grants her majority rights or a court consent order because the court finds that the abortion is in her best interests.<sup>81</sup> To receive either order, subsection (1) specifies who may file the petition and what allega-

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<sup>74</sup>AKRON, OHIO, CODIFIED ORDINANCES, ch. 1870.05 (1975).

<sup>75</sup>Section 1870.05(A) states: "No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or legal guardian . . . or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian . . . unless the abortion is ordered by a court having jurisdiction over such a minor pregnant woman."

<sup>76</sup>MO. ANN. STAT. § 188.028.2 (Vernon Supp. 1978).

<sup>77</sup>*Id.*

<sup>78</sup>MO. ANN. STAT. § 188.028.2 (Vernon Supp. 1978).

<sup>79</sup>MO. ANN. STAT. § 188.028 (Vernon Supp. 1978).

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

tions it must contain.<sup>82</sup> Subsection (3) details the character of the hearing which must be held “within five days of the filing of the petition.”<sup>83</sup> If the minor is unable to afford counsel, the court is also required to appoint counsel “at least twenty-four hours before the time of the hearing.”<sup>84</sup> At the hearing, to be held on the record, “the court shall hear evidence relating to [1] the emotional development, maturity, intellect, and understanding of the minor; [2] the nature, possible consequences, and alternatives to abortion; and [3] any other evidence the court may find useful . . . .”<sup>85</sup> Subsection (4) specifies the decisions which the court may make. It states that, subject to the general standard of good cause, the court shall:

- (a) Grant the petition for majority rights for the purpose of consenting to an abortion; or
- (b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion setting forth the grounds for so finding; or
- (c) Deny the petition, setting forth the grounds on which the petition is denied.<sup>86</sup>

Subsection (6) sets out the procedures to be followed by the minor seeking an expedited appeal from a court order.<sup>87</sup>

Section 188.028.2 also contains a blanket notice requirement that grants parents an extensive right to participate in the judicial proceedings. Subsection (2) requires that all parents be formally notified when their daughter chooses the judicial alternative.<sup>88</sup> Additionally, subsections (3) and (6) grant the parents

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<sup>82</sup>*Id.* Subsection (1) states: “The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or next friend of the minor shall thereafter file a petition setting forth [1] the initials of the minor; [2] the age of the minor; [3] the names and addresses of each parent, guardian . . . ; [4] that the minor has been fully informed of the risks and consequences of the abortion; [5] that the minor is of sound mind and has a sufficient intellectual capacity to consent to the abortion; [6] that, if the court does not grant the minor majority rights for the purpose of the abortion, the court should find the abortion is in the best interests of the minor and give judicial consent to the abortion; [7] that the court should appoint a guardian ad litem of the child; and [8] if the minor does not have private counsel, that the court should appoint counsel; [9] The petition shall be signed by the minor or by the next friend. *Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* Subsection (6) states: “An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice of appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.” *Id.*

<sup>88</sup>*Id.* Subsection (2) states in part: “Copies of the petition and notice of the date, time, and place of the hearing shall be personally served upon each parent [or guardian] . . . by the sheriff or his deputy. If a parent or guardian . . . cannot be personally served within two days after reasonable effort, the sheriff or his deputy shall give constructive notice to them by certified mail to their last known address, and the hearing shall not be held for at least forty-eight hours from the time of the mailing.” *Id.*

hearing and appeal rights and, if they are indigent, the right to a court-appointed lawyer.<sup>89</sup>

## B. Judicial Response

The judicial examination of the Akron ordinance and the Missouri statute raised several basic questions about third party participation. First, would any judicial alternative be acceptable? Second, if one were acceptable, would any Model III consent provisions which gave a minor the choice of adult participants sufficiently protect the minor's privacy right? Having given the minor an option, could the state impose a notice provision which would require a court to notify her parents and give them the right to participate before the court made a decision? Having given the minor a choice, would the character of the judicial consent procedure make any difference? Would it be sufficient if the law merely granted the minor the right to obtain an order from a state court, as the Akron ordinance did? If this brevity provided too much judicial discretion, could the law set-up a veritable procedural code, as the Missouri statute did, without imposing an impermissible burden on the minor? Finally, would any physician notice provision be consistent with the minor's right to choose the judicial alternative under a Model III consent provision?

### 1. Federal District and Court of Appeals Decisions

The *Akron Center* and *Ashcroft* cases, unlike *Bellotti II* and *Matheson*, involved the first adjudication of comprehensive abortion laws since *Danforth*. Therefore, the judicial evaluation of third party notification and consent provisions for minors took place within the context of laws establishing requirements for informed consent; waiting periods; inspections; hospital, post-viability, and emergency abortions; disposal of fetal remains; experimentation; reports; and recordkeeping.<sup>90</sup> Judicial evaluation also took place within the context of widespread adoption of these procedural requirements since the Akron ordinance had become the model for abortion laws in eleven states.<sup>91</sup>

#### a. Akron Center Case

In federal district court, Akron Center challenged the parental notice and consent provisions of the city ordinance. The court condemned section 1870.05(A)'s blanket physician notice requirement. Relying on Justice Powell's *Bellotti II* opinion, the court found the provision to be a significant intrusion upon the right of mature and "best interests" minors to a confidential judicial alternative. These minors, the court held, "must be afforded an opportunity to convince a court . . . that consultation would not be in their own, or in

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<sup>89</sup>*Id.* Subsection (3) requires a court to appoint counsel for any party unable to afford counsel twenty-four hours before the hearing and subsection (6) provides that an appeal "may be taken to the court of appeals of this state by the minor, by a parent, or guardian of the minor." *Id.*

<sup>90</sup>103 S. Ct. 2481 (1983); 103 S. Ct. 2517 (1983).

<sup>91</sup>E. RUBIN, *ABORTION, POLITICS AND THE COURTS* 137 (1982).



their parents', best interests."<sup>92</sup> The district court also found that section 1870.05(B)'s Model III consent provisions did not comport with *Danforth* and Justice Powell's opinion in *Bellotti II*, because it did not provide a judicial alternative to parental consent that allowed a minor to demonstrate in court that her consent was informed.<sup>93</sup> Therefore, without further discussion the court held that the ordinance's requirement that all minors receive parental consent or a court order placed "an impermissible right to veto the informed decision of a competent minor in her parents or, alternatively, in a court."<sup>94</sup>

On appeal, the Sixth Circuit found that the physician notice provisions of section 1870.05(A) required a different treatment since in the interim the Supreme Court had decided *H.L. v. Matheson*.<sup>95</sup> Using the standing doctrine as the Supreme Court had in *Matheson* to avoid the broader question of the notice provision's applicability to all minors, the court of appeals held that since no minor was questioning the validity of the ordinance, section 1870.05(A), like the parental notification provision in *Matheson*, was "a constitutionally permissible regulation insofar as it applie[d] to immature minors who live with their parents, are dependent upon them and are not emancipated by marriage or otherwise."<sup>96</sup> The appellate court then turned briefly to the ordinance's Model III consent provision and held that the district court had correctly found that section 1870.05(B) was unconstitutional because it imposed a third party veto.<sup>97</sup>

#### b. Ashcroft Case

Planned Parenthood challenged the validity of the Missouri statute's judicial consent procedure on several grounds,<sup>98</sup> but the district court limited its attention to only one issue: whether section 188.028.2(4)'s judicial consent procedure insufficiently confined a judge's discretion because it permitted a court to deny a minor access to an abortion even though she was mature enough to make her own decision.<sup>99</sup> The court declined to abstain under *Bellotti I* and read the statute disjunctively.<sup>100</sup> It concluded that each of subsection (4)'s three alternatives was independent of the others and consequently alternative (c) authorized a juvenile court "to deny the [minor's] petition . . . for good cause . . . but does not require a prior finding that the minor is not sufficiently mature and not competent to make a decision regarding abortion independently."<sup>101</sup> Therefore, the court held that subsection (4)'s decision criteria created an ab-

<sup>92</sup>479 F. Supp. 1172, 1202 (N.D. Ohio 1979).

<sup>93</sup>*Id.* at 1203.

<sup>94</sup>*Id.* at 1201.

<sup>95</sup>651 F.2d 1198, 1205 (6th Cir. 1981).

<sup>96</sup>*Id.* at 1206.

<sup>97</sup>*Id.* at 1205.

<sup>98</sup>483 F. Supp. 679, 688 (W.D. Mo. 1980).

<sup>99</sup>*Id.* at 689-90.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 689.

solite veto forbidden by *Danforth* and *Bellotti II*.<sup>102</sup>

On appeal, the Eighth Circuit examined Planned Parenthood's claim that section 188.028.2(2)'s requirement of judicial notification of all parents whose minors invoke the judicial alternative procedure was unconstitutional. The court stated that *H.L. v. Matheson*, upheld the physician's responsibility to make an initial determination about the maturity of a minor. If he concluded that she was immature and it would be in her best interests, he was required to contact her parents.<sup>103</sup> Extending *Matheson*, the court of appeals found subsection (2) unconstitutional, because it required a blanket notification of all parents irrespective of the minor's maturity or what the minor's best interests might require.<sup>104</sup> The court of appeals then proceeded to overturn the district court's holding that section 188.028.2(4) granted a court "unbridled discretion" to decide about a minor's abortion. The appellate court found that the statutory language "would initially require the court to find that the minor was not emancipated and was not mature enough to make her own decision and that an abortion was not in her best interests."<sup>105</sup> Read sequentially, the Eighth Circuit held that the statute's judicial decision criteria were constitutional.<sup>106</sup>

## 2. Supreme Court Decision

The *Akron Center* and *Ashcroft* cases presented only one issue to the Supreme Court on the subject of a minor's abortion decision-making: whether a city or state may enact a Model III consent provision which furthers a significant governmental interest by providing a minor with a judicial alternative to parental consent to her abortion. This section will examine the decision suggested by *Bellotti II* and then analyze the Court's actual decision. In both instances, the analysis will focus on the major criteria involved in Justice Powell's proposed judicial alternative: individuality, confidentiality, and expeditiousness.

### a. The Expected Decision

*Bellotti II* is the central case for evaluating the constitutionality of the Akron and Missouri consent provisions. In *Bellotti II* the Court, except for Justice White, condemned the Massachusetts Model II consent provisions, but justified that decision with two different rationales set out in the opinions of Justices Powell and Stevens. Since then, Justice Powell's proposed notice and consent provisions have set the standard for the analysis in federal courts. At the same time, Justice Stewart's resignation has diminished the Powell plurality to three and Justice O'Connor's appointment has added a relatively unknown variable to the difficulty of predicting judicial behavior. Nevertheless, this section will

<sup>102</sup>*Id.* at 690.

<sup>103</sup>655 F.2d 848, 858-59 (8th Cir. 1981).

<sup>104</sup>*Id.* at 859.

<sup>105</sup>*Id.* at 858.

<sup>106</sup>*Id.*

ask: What outcomes does *Bellotti II* suggest for the *Akron Center* and *Ashcroft* cases?<sup>107</sup>

The Akron ordinance provisions are unlikely to survive Supreme Court scrutiny. The Stevens and Powell pluralities will form a seven person majority to strike them down although agreement on a rationale will be difficult. The Stevens plurality, relying on a Pro-Woman Rationale, will object to the ordinance's judicial alternative, because it provides an unacceptable third party burden on a minor's abortion decision. The Powell plurality, turning to its Accommodation Rationale, will argue that the ordinance is unconstitutional because the state juvenile court alternative it provides will permit a judge to exercise unrestrained discretion to make a "best interests" judgment about all minors; it requires a blanket notification of and consultation with all parents irrespective of the minor's confidentiality interests; and it unduly burdens a minor's abortion decision because it fails to provide for an expedited hearing and appeal. Justice White will probably dissent. His support for third party involvement is clear from his Pro-State dissents in *Danforth* and *Bellotti II* and from his participation in Chief Justice Burger's opinion in *Matheson*.

The Missouri statute will meet an uncertain fate. The justices will not be able to examine the confidentiality of the judicial alternative because the state did not appeal the statute's judicial notice provision found unconstitutional by the Eighth Circuit.<sup>108</sup> The justices will, however, be able to examine the statute's individuality and promptness criteria. These will succumb to the Stevens plurality's opposition to third party participation. The Powell plurality will, however, sustain the evidentiary requirements of section 188.028.2 (3) and uphold the Eighth Circuit's sequential reading of subsection (4), because these provisions for mature and "best interests" minors will sufficiently confine judicial discretion.<sup>109</sup> The Powell plurality will also sustain the procedural criteria of subsections (3) and (6) because their assurance of an expeditious hearing and appeal will minimize the possibility that the judicial alternative will become a tedious and burdensome experience for minors.<sup>110</sup> If this alignment occurs, the votes of Justices White and O'Connor will be crucial. Justice White, given his support for third party involvement, may be persuaded to join in an opinion written by either Justice Powell, Justice Rehnquist, or Chief Justice Burger, but they will need the support of Justice O'Connor for an authoritative statement on a judicial alternative.

#### b. The Actual Decision

The Supreme Court's opinions in the *Akron Center* and *Ashcroft* cases,

<sup>107</sup>This question assumes that the Court will reach the merits in these two cases and not deny standing or abstain as they have been requested.

<sup>108</sup>MO. ANN. STAT. § 188.028 (Vernon Supp. 1978). Section 188.028.2(2) was held unconstitutional by the Eighth Circuit. See 655 F.2d at 858-60.

<sup>109</sup>MO. ANN. STAT. § 188.028.2(3),(4).

<sup>110</sup>MO. ANN. STAT. § 188.028.2(3),(6).

handed down at the end of its 1982 Term, reaffirmed a woman's constitutional right to obtain an abortion and struck down many procedural requirements regarding access to abortion.<sup>111</sup> The Court's decisions are particularly important because they produced agreement among a majority of the justices for the first time on a third party consent requirement for minors.

In *Akron Center* Justice Powell, speaking for six members of the Court,<sup>112</sup> dismissed the City's abstention argument<sup>113</sup> over Justice O'Connor's dissent.<sup>114</sup> Then he went on to uphold the Sixth Circuit's finding that section 1870.05(B) of the Codified Ordinances of Akron violated the "relevant legal standards" used in *Danforth* and *Bellotti II*. The Akron ordinance did not expressly create a judicial alternative based on Justice Powell's *Bellotti II* opinion, because it required the minor to resort to a state juvenile court where she was not permitted to "demonstrate that she . . . [was] sufficiently mature to make the abortion decision herself or that, despite her immaturity an abortion would be in her best interests."<sup>115</sup> Consequently, Justice Powell found that the ordinance violated his Model III consent provisions, because it had made an impermissible "blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval."<sup>116</sup>

Justice Powell also announced the judgment for the Court in *Ashcroft*, upholding the Missouri statute's judicial alternative in section 188.028.2,<sup>117</sup> however only the Chief Justice joined in his opinion based on the Accommodation Rationale. Justice Powell found that section 188.028.2 complied with the standards of his *Bellotti II* opinion: individuality, confidentiality, and expedition. Confidentiality was assured, he said, by subsection (1)'s requirement that allows the minor to use her initials on the petition<sup>118</sup> and expedition was assured by subsection (6)'s provision for a speedy appeal.<sup>119</sup> Justice Powell's major concern, however, was with the statute's individuality criteria. Did subsection (4) permit a court to disregard the interests of mature and "best interests" minors? He rejected Planned Parenthood's argument that the Court should abstain because of the ambiguity of subsection (4) as evidenced by the different interpretations placed upon it by the district court and the Eighth Circuit.<sup>120</sup> Then he turned to the merits which he examined as an issue of statutory con-

<sup>111</sup>103 S. Ct. 2481 (1983); 103 S. Ct. 2517 (1983).

<sup>112</sup>The Powell majority included Chief Justice Berger and Justices Stevens, Brennan, Marshall, and Blackmun.

<sup>113</sup>103 S. Ct. at 2497-99.

<sup>114</sup>*Id.* at 2513-14.

<sup>115</sup>*Id.* at 2498.

<sup>116</sup>*Id.*

<sup>117</sup>103 S. Ct. at 2525-26.

<sup>118</sup>*Id.* at 2525 n.16.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.* at 2526.

struction: whether or not subsection (4) provided “an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that despite her immaturity an abortion would be in her best interests.”<sup>121</sup> Justice Powell acknowledged that subsection (4) on its face authorized a judge to choose among its three alternatives, but once again he approved the Eighth Circuit’s reasoning, saying “[t]he Court of Appeals reasonably found that a court could not deny a petition ‘for good cause’ unless it first found . . . that the minor was not mature enough to make her own decision.”<sup>122</sup> So construed, Justice Powell found that subsection (4)’s judicial alternative decision criteria were consistent with “established legal standards.”<sup>123</sup> Justice O’Connor, joined by Justices White and Rehnquist in a brief concurrence, agreed that subsection (4)’s judicial consent provision was constitutional because “it imposes no undue burden on any right that a minor may have to undergo an abortion.”<sup>124</sup>

Justice Blackmun’s dissent, which was joined in part by Justices Brennan, Marshall, and Stevens, emphasized that in *Bellotti II* they had concluded that “any judicial consent statute would suffer from the same flaw that the Court identified in *Danforth*: it would give a third party an absolute veto over the decision of the physician and his patient.”<sup>125</sup> On the basis of this Pro-Woman Rationale, Justice Blackmun found section 188.028.2 unconstitutional.<sup>126</sup>

### c. Comparisons

*Bellotti II* proved fairly accurate in suggesting the outlines of these decisions. In *Akron Center* both pluralities, Justice Rehnquist excepted,<sup>127</sup> condemned the ordinance while Justice White dissented. In *Ashcroft*, Justices White and O’Connor’s support was crucial to the 5-4 outcome in which the Stevens plurality dissented. *Bellotti II* was also helpful in focusing attention on one major development: Justice Powell’s opinions and the behavior of the Stevens plurality. In his *Akron Center* opinion, Justice Powell asserted that “relevant legal standards” were not in dispute.<sup>128</sup> *Danforth* would not permit a blanket consent provision, although a majority in *Bellotti II* — the Powell plurality and Justice White in his dissent — would support a consent alternative.<sup>129</sup> Then Justice Powell even more boldly asserted that *Bellotti II* supported the conclusion that this consent alternative must be tailored to the interests of mature

<sup>121</sup>*Id.* at 2525.

<sup>122</sup>*Id.* at 2526.

<sup>123</sup>*Id.* at 2525.

<sup>124</sup>*Id.* at 2532.

<sup>125</sup>*Id.* at 2531.

<sup>126</sup>*Id.* at 2532.

<sup>127</sup>Justices White and Rehnquist joined in Justice O’Connor’s dissenting opinion.

<sup>128</sup>103 S. Ct. at 2497.

<sup>129</sup>*Id.*

and “best interests” minors. What is extraordinary is that this argument goes unanswered in *Akron Center*. The Stevens plurality should have concurred arguing that the Akron ordinance violated the *Roe* bilateral model.<sup>130</sup> Justice Powell’s opinion should also have prompted Justices Stevens, Brennan, Marshall, or Blackmun to state in their concurrence that Justice Powell had impermissibly rewritten *Bellotti II*. Instead they joined in Justice Powell’s majority opinion. This behavior, by itself, may have indicated a substantial shift from their commitment to a Pro-Woman Rationale, but this possibility was dispelled by their subsequent behavior in *Ashcroft*. When Justice Powell upheld section 188.028.2(4)’s individuality criteria because it was consistent with “relevant legal standards” approved in *Akron Center*, Justice Blackmun responded: “Until today, the Court has never upheld ‘a requirement of a consent substitute, either parental or judicial’ . . .”<sup>131</sup> He then went on to argue that Justice Powell’s reading of *Bellotti II* was expansive and misleading because it did not support a consent requirement and its individuality criteria were merely the product of the Powell plurality’s advisory opinion.<sup>132</sup>

In sum, a majority of the Court in *Akron Center* agreed that states could require third party participation based on a Model III provision which protected mature and “best interests” minors. In *Ashcroft* the Court then went on to approve a statute that complied with that individuality criteria. Thus *Akron Center* and *Ashcroft* were a first step in fashioning a third party model for a minor’s abortion decision-making based on the Accommodation Rationale as elaborated by Justice Powell in his *Bellotti II* opinion.

### III. CONCLUSIONS AND PROSPECTS

This article has examined the issue of third party participation in a minor’s abortion decision. It has argued that the Supreme Court’s decisions are based on three rationales. These rationales — Pro-Woman, Pro-State, and Accommodation — have explained how agreement on the modification of the *Roe* bilateral model originated, what direction it has taken, and at whose initiative.

The three rationales appeared in *Danforth* where the Court first confronted the issue of third party participation. The Pro-Woman and Pro-State Rationales set the boundaries for debate. Within those boundaries, Justice Stewart in his concurrence joined by Justice Powell suggested the Accommodation Rationale. Then in *Bellotti II*, Justice Powell took the initiative by formulating a synthesis. This was the decisive act in the entire debate over third party participation. Since then, Justice Powell’s proposed consent and notice provisions have established a standard for the evaluation of state legislation in the lower federal courts and set the agenda for debate by the Supreme Court.<sup>133</sup> In *Matheson*,

<sup>130</sup>*Id.*

<sup>131</sup>103 S. Ct. at 2531 (quoting Justice Powell, 103 S. Ct. 2517, 2519 (1983)).

<sup>132</sup>*Id.* at 2531.

<sup>133</sup>Justice Powell’s opinion in *Bellotti II* was followed in every major federal court case involving parental consent and notice provisions. See *Scheinberg v. Smith*, 659 F.2d 476, 480 (5th Cir. 1981); *Planned* Published by IdeaExchange@UAkron, 1984

Justice Powell acknowledged in a concurrence that a limited physician notice provision was consistent with his *Bellotti II* opinion. Then in *Akron Center*, Justice Powell once again took the initiative. This time he engaged in an imaginative recreation of *Bellotti II* when he declared that it supported third party participation, but that any regulation of a minor's abortion decision-making must provide an exception for mature minors. Then in *Ashcroft*, he found that the statute's judicial alternative complied with the "established legal standard" announced in *Akron Center*.

What is the current situation? The *Roe* bilateral model has been modified in two respects. First, states may require third party consent on the basis of a Model III consent provision. Such a provision must give the minor a choice of consent by either her parents or a court. If she chooses the judicial alternative, the judge's discretion is limited by the criteria of individuality: his decision must take into consideration the maturity and best interests of the minor. Second, a state may impose a requirement that a physician notify, if possible, the parents of an immature, dependent minor.

What cities and states may do to provide for third party participation is still not entirely clear. If a Model III consent statute is to be based on Justice Powell's criteria of individuality, confidentiality, and expeditiousness, then the Supreme Court has only partially completed its task. The Missouri statute may well serve as a model for compliance with the individuality criteria and thereby assure that mature and best interests minors will be protected from an abuse of judicial discretion. Yet Model III consent statutes will continue to be the subject of future Supreme Court litigation because the justices have not given any meaningful attention to the confidentiality and expeditiousness criteria of the judicial alternative.

Expeditioness is necessary to assure that the minor's use of the judicial process — the filing of the petition, the hearing, and any appeals — will occur with the minimum necessary delay and impose the minimum necessary burden on the exercise of her constitutional right. Speed and simplicity are central to any Model III judicial alternative. The Missouri statute examined in *Ashcroft* provided for some of those expeditiousness needs. Section 188.028.2(3) states that the hearing will occur within five days of the filing of the petition and a court-appointed attorney will be provided twenty-four hours prior to the hearing.<sup>134</sup> Section 188.028.2(6) also states that notice of appeal must be provided within twenty-four hours after the hearing and perfected within five days from the issuance of the court order.<sup>135</sup> This section then directs the state supreme court to provide by court rule for expedited appeals.<sup>136</sup> In *Ashcroft*, Justice

*Parenthood League v. Bellotti*, 641 F.2d 1006, 1009-11 (1st Cir. 1981); *Leigh v. Olson*, 497 F. Supp. 1340, 1344 (D.N.D. 1980); *Margaret S. v. Edwards*, 488 F. Supp. 181, 203-05 (E.D.La. 1980); and *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542, 547 (D.Me. 1979).

<sup>134</sup>MO. ANN. STAT. § 188.028.2(3) (Vernon Supp. 1978).

<sup>135</sup>MO. ANN. STAT. § 188.028.2(6) (Vernon Supp. 1978).

<sup>136</sup>*Id.*

Powell gave limited attention to these expeditiousness features of the statute. In a footnote, he approved of subsection (6) because, he said, it provided “the framework for a constitutionally sufficient means of expediting judicial proceedings.”<sup>137</sup>

Justice Powell’s cursory examination of the Missouri statute means that in the future the Court will probably have to give serious attention to what a statute must contain to be sufficiently expeditious. When it does, it may be able to examine time limits similar to those in the Missouri law and rules promulgated by a state supreme court. The Court may also be able to examine provisions not contained in the Missouri law. These include requirements governing the filing of the petition — the use of a standardized form and the payment of a filing fee — and time limits for a trial court’s decision and appellate review.

How is the expeditiousness criteria likely to be articulated by the Supreme Court? *Ad hoc* examination of state statutes containing judicial alternatives could prove to be tedious and provide only fragmented guidance. If Justice Powell continues to influence the shape of the judicial alternative, he may once again be able to engage in policy leadership as he did in *Bellotti II* and *Akron Center*. If so, he may be able to further define what Model III consent provisions must contain to assure that the judicial alternative will be sufficiently speedy and simple so that it will not burden the minor’s constitutionally protected right.

Confidentiality is central to any meaningful judicial alternative. The alternative must assure that the minor’s legal action will remain anonymous in two respects. First, it must assure that no one will be able to uncover her identity from legal records. So far the Court has given only passing attention to this aspect of confidentiality. In *Ashcroft*, Justice Powell believed that confidentiality was assured by the statutory requirement that allows the minor to use her initials on the petition.<sup>138</sup> The Missouri statute also required that the minor’s petition contain her age and the names and addresses of her parents, but Justice Powell said nothing about this information.<sup>139</sup> Disclosure of her age would appear to be unobjectionable, but information about her parents would deprive her of legal confidentiality. Second, confidentiality must assure the minor that her use of the judicial process will remain unknown to her parents. The Court examined this aspect of confidentiality in *Bellotti II* where it forbade the use of a blanket judicial notice provision, and in *Matheson* where it permitted a limited physician notice requirement. The Court has not, however, explored the relationship between the judicial consent alternative approved in *Akron Center* and these two forms of notice. The Court has not addressed the general

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<sup>137</sup>103 S. Ct. at 2525 n.16.

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*



question: What notice, if any, must be given to parents whose minor child invokes the judicial process? When the Court does examine this question, it will have to consider two subsidiary question: (1) What notice, if any, must the courts provide parents before they decide on the minor's petition? and (2) Once the minor has a court order, what notice, if any, must physicians provide parents before they perform the abortion?

How are these questions likely to be answered in future cases? If Justice Powell continues to influence the shape of the judicial alternative, it is likely that he may again take the initiative, as he did in *Bellotti II* and *Akron Center*, to define the scope and depth of a permissible judicial notice provision. If he does, he may argue that the individuality criteria that received majority support in *Akron Center* are meaningless for mature and "best interest" minors without an assurance of confidentiality. He may go on to argue that *Bellotti II* will not permit notice to any parent whose child has filed a petition for a court-ordered abortion. Parental notice will occur, if at all, only after a court makes a judgment about the minor's status. If the minor convinces a court of her maturity, then consultation would not be permitted. If, however, a court denies her request for majority rights or rejects her claim of maturity, then *Bellotti II* would grant a court discretion to determine whether parental notice and consultation would be in the best interests of an immature minor.

Once the minor has a court order, the scope and depth of physician notice provisions are relevant to the confidentiality a minor has sought from her election of a judicial consent alternative. It is unlikely that the physician notice provisions will be expanded to include mature minors or to permit parental consultation with all minors before the physician performs the abortion. Blanket physician notice provisions would be inconsistent with blanket judicial notice provisions condemned in *Bellotti II*, unlikely to gain majority support from a court committed to a narrow reading of *Matheson*, and arguably intrusive of the right *Akron Center* and *Ashcroft* granted to mature minors. Even if *Matheson* remains unaltered, it may create a problem for the Court. If the Court does limit judicial notice statutes as described above, then an immature minor who is granted a court-ordered abortion without parental consultation may have the confidentiality of her decision intruded upon by a statute that requires a physician to notify the parents of immature dependent minors. One possible escape from this dilemma would be a requirement that court orders include a prohibition of physician notice in cases of immature and dependent minors whose best interests a judge has decided would not be served by parental awareness.